STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TIMOTHY EDWARD LEE, Charging Party, v. PERALTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2308-E PERB Decision No. 1576 December 31, 2003

Appearance: Timothy Edward Lee, on his own behalf.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Timothy Edward Lee (Lee) of a Board agent's dismissal. The unfair practice charge alleged that the Peralta Community College District (District) violated the Educational Employment Relations Act (EERA) [1] by failing to implement an arbitrator's award to reinstate Lee as a permanent employee, in part by failing to consult with Service Employees International Union Local 790 (SEIU) and Lee pursuant to the arbitrator's decision; by withholding vacation pay, sick leave and longevity pay from Lee; and by hiring student employees in violation of the collective bargaining agreement (CBA). Lee alleged that this conduct constituted a violation of various provisions of the CBA.

Upon review of the entire record, including the unfair practice charge, the amended charge, the Board agent's warning and dismissal letters, and Lee's appeal, the Board affirms

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

the Board agent's dismissal consistent with the discussion below. The Board will also address the issues raised by Lee on appeal.

BACKGROUND

Lee was a police service employee with the District, who participated in an arbitration proceeding regarding his continued employment. The arbitration arose out of a previous unfair practice charge regarding the denial of permanent employment by the District pursuant to a 1996 agreement between SEIU and the District. On November 25, 2001, the arbitrator issued a partial award to Lee, which states, in pertinent part:

> The [g]rievant's layoff was in violation of the 1996 Agreement (Joint Ex. 2). The District shall consult with the Union and the Grievant concerning the Grievant's placement as required by the 1996 Agreement. The Grievant shall receive no back pay. From the date of this award to the time the parties terminate the consultative process, the Grievant shall be entitled to the difference in pay between his Police Services salary and any income he earns in employment outside the District. He shall also be entitled to any benefits he currently would have had he not been laid off.

Lee alleges that the District has not met with SEIU as required by the arbitrator's decision. The District has required him to apply for positions. Lee complains that temporary positions were not posted and students were hired for those positions in violation of sections 3.2, 17.2.2, and 17.3 of the 2000-2003 CBA.[2] As noted in footnote 2 below, both sections 3.2

[2]CBA (2000-2003) Article 3.2 provides, in pertinent part:

> The District is committed to vigorous affirmative action in all aspects of its employment program, including selection, assignment, promotion and transfer. . . . Furthermore, the District agrees that there shall be no discrimination, interference, restraints or coercion by the District or any of its agents against any of its employees because of membership in the union or exercise of rights to engage in Union activity. Alleged violations of this Article 3 shall be processed exclusively through the District discrimination complaint resolution procedures.

and 17.3 prohibit discrimination based upon protected activity. The students maintained their jobs beyond the allotted 195-day period in violation of Education Code section 88003[3] or the

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(Note: The record does not contain the referenced discrimination complaint resolution procedures.)

Article 17.2.2 provides, in pertinent part:

> When a temporary vacancy exists in the highest classifications of SEIU Local 790, the District agrees to post an announcement of the temporary vacancy to allow District employees an opportunity to work out-of-class to gain knowledge and experience for career advancement.

Article 17.3 provides:

> The District and its agent or agents shall in no way discriminate against, discourage, obstruct, harass any employee who applies for a vacancy or who participates on any screening committee or on any applicant's behalf as an appointed agent of SEIU Local 790.

[3]Education Code 88003 provides, in pertinent part:

> The governing board of any community college district shall employ persons for positions that are not academic positions. . . . 'Short-term employee,' as used in this section, means any person who is employed to perform a service for the district, upon the completion of which, the service required or similar services will not be extended or needed on a continuing basis. Before employing a short-term employee, the governing board, at a regularly scheduled board meeting, shall specify the service required to be performed by the employee pursuant to the definition of 'classification' in subdivision (a) of Section 88001, and shall certify the ending date of the service. The ending date may be shortened or extended by the governing board, but shall not extend beyond 75 percent of a school year.
>
> 'Seventy-five percent of a college year' means 195 working days, including holidays, sick leave, vacation and other leaves of absences, irrespective of number of hours worked per day.
>
> Employment of either full-time or part-time students in any college work-study program, or in a work experience education program shall not result in the displacement of classified personnel or impair existing contracts for services.

184-day limit under District board policy number 3.34. He also alleges that the District has withheld sick leave, longevity and vacation pay due him. The only time Lee alleges that he had had communication from the District was a termination letter dated November 21, 2002 and attached to the charge, the termination to be effective November 30, 2002. Attachments to the amended charge demonstrate that Lee was invited to at least one interview. The termination letter alludes to a meeting between the District, SEIU and Lee, which occurred on December 20, 2001. Another attachment involves correspondence dated January 13, 2003 from SEIU to the District requesting a meeting to discuss reemployment of Lee. The instant charge was filed with the Board on December 12, 2002 and the amended charge on January 22, 2003.

The Board agent concluded that the charge should be dismissed. She found that Lee's allegation that the District failed to provide sick leave and vacation pay did not include a "clear and concise statement of the fact and conduct alleged to constitute an unfair practice," as required by PERB Regulation 32615(a)(5)[4]. The Board agent also found that, since individuals lack standing to allege unilateral change violations and to allege violations of EERA provisions that protect the rights of employee organizations, Lee lacked standing to allege that the District failed to consult with SEIU or violated the CBA by hiring student employees. The Board agent further found that the Board lacked jurisdiction to enforce arbitration decisions and so cannot enforce the alleged violations of the November 2001 award in requiring Lee to apply for jobs and then by terminating him.

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

LEE'S APPEAL

Lee's appeal provides more information than his charge. The appeal is summarized below.

In 1996, the District dissolved its police services, transferred the functions to Alameda County, and negotiated an agreement with SEIU to address the impact on covered employees. The agreement with SEIU, dated August 13, 1996, provides for, inter alia, negotiations of severance pay, additional retirement credit, either District jobs for those not qualified to work for Alameda County or severance pay pursuant to the future agreement to be negotiated between SEIU and the District, and continued negotiations for affected employees after the transfer occurs.

Lee had been a police officer for the District from July 1990 to August 1996. The circumstances of Lee's employment between 1996 and July 2000 are unclear. Apparently, Lee was laid off in July 2000 and his layoff was the subject of the previous unfair practice charge. Lee claims that the District used negative evaluations and written reprimands[5] to support his termination. Although also unclear from the record, the Board probably deferred the charge to arbitration. On November 15, 2001, the arbitrator ruled, in part, in Lee's favor, requiring, among other things, the District to consult with SEIU and Lee regarding his placement in a permanent position and to pay Lee benefits. Lee says that the District required him to apply for jobs instead of placing him. According to Lee, available openings were not posted in violation of the CBA but instead the District hired student employees. SEIU and Lee met with Larry Hardy (Hardy), the District human relations director, on December 20, 2001 and

[5]One of these reprimands is attached to his appeal from March 1998. Specifics on other reprimands or evaluations were not provided.

January 15, 2002 to discuss possible placement. Hardy informed Lee that he would receive no special treatment. Hardy did not show up for another meeting scheduled for January 11, 2002. During the January 15 meeting, there was discussion of monies due Lee from the District but Lee states that he never received this money.

By letter dated November 21, 2002, the District unilaterally declared the consultative process under the arbitration award to be completed and terminated Lee's employment without an offer of severance pay. The letter states that Lee was advised to apply for certain positions with the District but Lee declined to do so. The letter further states that Lee applied for two other positions, was interviewed for them, and was not offered either position. In fact, according to Lee, Lee was advised that he was not qualified for some of these positions and so did not apply, and was still participating in the interview process for other positions. Letters from staff responsible for interviews are attached to his appeal as support.

Lee also reiterates that the District denied him sick leave, vacation and longevity pay in violation of the CBA. However, in his appeal, for the first time, he provided specific amounts that he believes the District owes him for each type of pay and attached pertinent portions of the CBA to support his position.

From these facts, Lee argues that the District violated the 1996 agreement by its failure to consult with SEIU and with him regarding his job placement. Lee states that the District violated the agreement by placing him in a position outside his union's unit into Local 39's unit without his consent.[6] Local 39 grieved his placement and won the arbitration. The District failed to place him in a comparable position and instead used negative evaluations and written reprimands to lay him off due to a purported lack of work. Lee filed an unfair practice

[6]Lee here implies, but does not explain, the existence of a different employee organization representing the police services employees before 1996.

charge (Case No. SF-CE-2140) over the improper layoff which the Board determined should be arbitrated. The case was arbitrated in mid-2001 and as stated in the charge, the arbitrator ordered that he be returned to permanent status with full pay and benefits. The District failed to post temporary and permanent vacancies in violation of the CBA, but instead hired students and allowed them to work beyond the time periods allowed under District board policy and under Education Code section 88003.

On appeal, Lee further argues that the District discriminated against him by his termination and the placement of negative letters in his personnel file. For the first time on appeal, Lee also claims that he was the only employee from police services required to apply for, rather than be placed in, an open position; however, despite the District's stance, he contends that he did apply for Alternative Media Specialist, Computer Operator I and Staff Assistant/Information Technology, positions for which he was qualified. He also states that he asked about a Network Coordinator position and was told that he was not qualified.

DISCUSSION

Lee claims that the District denied him payments due for sick leave, vacation and longevity pay. The charge as amended fails to provide specifics sufficient to state a prima facie case. (PERB Reg. 32615(a)(5); State of California (Department of Food and Agriculture) (1994) PERB Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944 and Charter Oak Unified School District (1991) PERB Decision No. 873.) Lee only provided such specifics in his appeal. As explained below, the Board finds no good cause to accept these new facts on appeal.

We also find that Lee, as an individual, lacks standing to allege violations of EERA provisions that protect employee organizations, including a refusal to consult with the employee organization or a unilateral change in terms and conditions of employment. (Oxnard

School District (Gorcey and Tripp) (1988) PERB Decision No. 667; State of California (Department of Corrections) (1993) PERB Decision No. 972-S (Corrections).) "The right of an employee organization to represent its members is not a right that an individual member can appropriately vindicate." (Corrections, dismissal letter, p. 6.) Therefore, we dismiss Lee's allegations regarding the District's failure to consult with SEIU or the hiring of students in violation of the CBA.

Lee asks the Board to enforce the November 2001 arbitration award. The Board lacks jurisdiction to enforce arbitration awards. (EERA sec. 3541.5(b); State of California (Department of Youth Authority) (2003) PERB Decision No. 1526-S.) Should Lee otherwise seek to enforce the arbitration award, appropriate forums exist for Lee to enforce rights granted under the award.

We further find that Lee failed to state a prima facie case for discrimination. To demonstrate a violation of EERA section 3543.5(a), Lee must show that: (1) he exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; and (3) the District imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced Lee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Lee has alleged protected conduct: participation in an unfair practice charge, and grievance and arbitration proceeding involving his layoff, which occurred in 2000-2001. The District obviously is aware of Lee's participation in these activities. Lee has also alleged adverse action by the District: the District's failure to place him in an open position and its termination of his employment in November 2002. However, the written reprimand from 1998 is untimely alleged as an adverse action. (EERA sec. 3541.5(a)(1).)

But Lee has failed to show a nexus between the protected conduct and the adverse action. Although the timing of the District's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the District's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the District's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the District's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the District's cursory investigation of the employee's misconduct; (5) the District's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) District animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.) Other than the one written reprimand, dated March 1998, Lee failed to provide specifics about negative evaluations or written reprimands, such as dates, subject matter, or writer. This reprimand occurred before the protected activity and so cannot be evidence of animus toward Lee. In his charge, Lee has alleged no other facts sufficient to demonstrate nexus.

For the first time on appeal, Lee alleges that he was treated differently from other police service employees. PERB Regulation 32635(b)[7] precludes a charging party from raising

[7]PERB Regulation 32635 provides, in pertinent part:

new allegations on appeal unless good cause is shown. Lee did not provide facts showing good cause to raise this new allegation or provide an explanation for alleging these new facts. (Oakland Education Association (Freeman) (1994) PERB Decision No. 1057; Regents of the University of California (1994) PERB Decision No. 1058-H.) The facts were known to Lee at the time he filed his charge. This allegation further lacks specifics regarding the identities of other similarly-situated individuals who were placed in District positions, the timing of the placements, or the specific jobs that these individuals were placed in.

For the same reasons, we cannot accept the new evidence raised regarding specific sick leave, vacation, and longevity pay amounts allegedly due Lee and the pertinent CBA requirements that he provided for the first time on appeal. Similarly, as asserted by Lee, these pay allegations may be covered by the arbitration award, enforcement of which is not subject to PERB's jurisdiction.

The Board therefore concludes that Lee has not stated a prima facie violation of EERA and his charge must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-2308-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Neima joined in this Decision.

(b) Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.